

APPLICANTS:

Thomas C. and Marlene E. Rye

REQUEST: A variance from the requirements of the Harford County Code or, a Use variance to permit the existing structure to be used as a warehouse/storage facility

HEARING DATE: July 7, 2004

BEFORE THE**ZONING HEARING EXAMINER****FOR HARFORD COUNTY****BOARD OF APPEALS**

Case No. 5428

ZONING HEARING EXAMINER'S DECISION

APPLICANTS: Thomas C. Rye and Marlene E. Rye

LOCATION: 116 Philadelphia Road, Joppa
Tax Map: 64 / Grid: 3E / Parcel: 215 / Lot: 45
First Election District

ZONING: R1 / Urban Residential

REQUEST: A variance from the requirements of the Harford County Code, or in the alternative, a Use variance pursuant to Section 267-11 and Table I, Principal Permitted Uses, Warehousing, Wholesaling and Processing of the Harford County Code to permit an existing structure to be used as a warehouse/storage facility in a R1 District.

TESTIMONY AND EVIDENCE OF RECORD:

The Co-Applicant, Thomas C. Rye, identified himself as an owner of the subject property located at 116 Philadelphia Road, Joppa, Maryland. Mr. Rye is requesting a variance to allow the subject property to be used as a warehouse/storage facility.

Mr. Rye discussed the history of the subject property, which he purchased in 1976. The property consists of a 1,300 square foot building located on a half (½) acre of property. The building was originally constructed and used as a telephone facility by AT&T. Mr. Rye described the improvements as being, and the photographs in the record demonstrate, a relatively small, brick building, with a slate roof.

The property has public water available to it, although not connected to the structure. There was no public sewer to the property when Mr. Rye purchased it in 1976, nor is there public sewer available to it today. Sanitation needs were met by an outhouse which was located behind the building.

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Mr. Rye described the properties adjacent to the subject property on either side as being improved by houses in very bad condition, possibly vacant. Mr. Rye described the area around the subject property as having changed little over the years, although there has been some general improvement. The neighborhood has mixed residential and business uses.

In 1976 or 1977, shortly after purchasing, Mr. Rye requested a variance to operate a business from the subject property. That variance was granted and the approved business was thereafter operated by Mr. Rye and his family. That business manufactured electrical wiring harnesses, and employed Mr. Rye, his wife and some family members. While the building was dedicated to this use, it appeared from Mr. Rye's testimony that the building was not actually used by employees every day. Employees of the wiring harness business used the outhouse. Mr. Rye stated that continued use of the building for this small manufacturing operation complied with all zoning regulations, including the earlier variance approval.

According to Mr. Rye, some confusion arose in the year 2003, when he attempted to lease the property to a tenant for storage purposes. He was originally told by the Harford County Department of Planning and Zoning that the building could be used without a permit. Later, he received a letter from the Harford County Department of Planning and Zoning which stated that the permit for the use was denied. Furthermore, the Harford County Health Department has informed the Applicants that the property cannot be used for residential purposes due to its lack of percolation, but that the Health Department would approve a holding tank if the facility is approved for warehouse/storage use. (See Attachment 14 to the Staff Report, Memorandum of May 27, 2004.)

Mr. Rye now seeks approval for this warehouse/storage facility. The Applicant stated that he knows of no other use of the property which can be made without the variance. Mr. Rye feels that the proposed use would not be harmful to the neighborhood. He feels that the property has been well maintained, and would continue to be well maintained if the variance were granted. He has no objection to any of the recommendations of the Staff Report.

Mr. Rye was then cross-examined by People's Counsel. He indicated that he was aware of the use of the property when he purchased it, and believed the zoning at that time was agricultural. He is aware that zoning has been changed to R-1. He has never requested a change of zoning.

Mr. Rye indicated that he used the building from 1976 to 2003 for his small manufacturing business. He was at the property regularly as part of that business, but not every day, and sometimes not every week. He had at least one full time employee until the mid 1980's. After that he and his family continued to work in the business. Mr. Rye stopped using the facility for his manufacturing business about a year and a half ago. He is aware of no problems or complaints concerning his use of the building up until that time.

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Public water was available to the property when purchased. However, public water has never been connected.

Mr. Rye rented the property to a homebuilder in late November 2003. The tenant was in the carpentry business, and primarily performed home renovations. His tenant, however, installed a dumpster and spot-a-pot on site. Mr. Rye immediately notified his tenant that those improvements had to be removed.

Until recently Mr. Rye still had some of his wire cutting equipment located within the building. This equipment he used occasionally until he leased the property to the tenant. Some of the equipment remains in the building.

No property around the subject property has public sewer. Public sewer is yet to be brought to the area.

Next for the Harford County Department of Planning and Zoning testified Anthony McClune. Mr. McClune stated that the building was originally constructed by AT&T, which used it for its commercial activities. It has never been used for residential purposes. Mr. McClune confirmed that the Board of Appeals had approved Mr. Rye's earlier request for a variance.

According to Mr. McClune, the Harford County Health Department will not approve a sewer system for residential uses. Public sewer will not be extended to the property for at least five to seven years, if not longer. Without Board of Appeals approval the Applicant cannot use the property for any reasonable use. Accordingly, Mr. McClune feels the property is unique and recommends approval of the variance.

On cross-examination Mr. McClune stated that a warehouse and storage facility is a reasonable use for this site as long as all materials are contained wholly within the building. He believes that some landscaping along the front of the building would help to mitigate impact. There are other non-conforming commercial uses located on residentially zoned properties in the neighborhood. These other non-conforming uses include a sign business and at least one other commercial facility in the area. All are small, neighborhood-type businesses.

The zoning of the subject property and others in the area was changed to R1, Mr. McClune believes, in 1982.

According to Mr. McClune, the area has percolation problems. The subject property is the same as others in the area in this regard.

The Harford County Department of Planning and Zoning took no action at any time to prohibit Mr. Rye from using the building for a wire manufacturing business. The Applicant can continue to use the building for that purpose today under the prior zoning approval.

Mr. McClune gave his opinion that the proposed use would not be an intense one, and would

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not pose an adverse impact to the neighborhood. Mr. McClune admitted that he did not know how many employees would be utilized in the building if the variance were approved.

In opposition testified Laraine Harkins, a resident of Alexis Drive. Ms. Harkins indicated that she lives about 2,000 feet from the subject property, and has lived in her residence since 1979. She knows the neighborhood well. The area is zoned residential, and has a few non-conforming businesses. There are many other residences in the area, some of which have been converted from business uses.

Ms. Harkins introduced a series of photographs, all showing various homes in the neighborhood which she indicated are indicative of the types of dwellings located around the subject property.

Ms. Harkins feels that the property is not unique. There is nothing different about this property from others in the neighborhood. The topography and surface condition of the property is the same as others.

She had no idea that Mr. Rye's manufacturing business was located on the subject property. She never saw any activity; she never saw a sign on the property; she never saw any vehicles coming or leaving. She believed the property was used as a telephone building.

Ms. Harkins understands that sewer service may be four to five years away. Other properties have sewage disposal problems as well. Ms. Harkins indicated, under cross-examination, that she cannot see the property. She also acknowledged that at least two other properties in the area have holding tanks.

Ms. Harkins agreed it was possible that a business was located in the building without her knowledge.

Ms. Harkins is concerned are that the proposed use would not be compatible with the neighborhood. She wants residences in the neighborhood, not warehouses. She is opposed to a variance for any reason. She feels that the proper use is a residence. When sewer service eventually comes to the area the property's best and highest use would be for residential purposes. She would rather have cars in the neighborhood than trucks.

Next testified Norbert Semenkow of 119 Philadelphia Road, Joppa.

Mr. Semenkow stated that he lives about 500 feet away from the subject property, and has lived in the area since 1976. Mr. Semenkow believed the building had been abandoned. There was no sign of activity over the years until recently when he began to observe trucks moving in and out of the property. He saw little activity over the years. The neighborhood is quiet although it has gotten busier over the years.

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Mr. Semenkow stated that there is nothing unique about the subject property. It is not different from many others in the neighborhood. Other properties in the neighborhood also have holding tanks. He does not want the use, as he does not want the neighborhood to be changed to commercial. He wants the neighborhood to stay residential.

Next testified Thomas Harkins of 1400 Alexis Drive, Joppa. Mr. Harkins has lived in the neighborhood for approximately twenty-five years.

Mr. Harkins is concerned about the proposal. The changes in the neighborhood over its most recent history have been positive, primarily being improved residential properties. He sees Mr. Rye's request as a step backward from that progress.

Mr. Harkins referred to a Harford County sewer study which found that only eight (8) parcels out of approximately four hundred eighty (480) studied in the area had holding tanks.

Mr. Harkins again stated that there has been a change to the neighborhood with some non-conforming uses having been terminated, with the change being to more residential.

A number of residents then stood and identified themselves as being generally opposed to proposed request. Among those neighbors was D.B. Hepner, Nick Wake and Wendy L. Wake.

Mr. Rye was then re-called. He stated that he did not realize his proposed tenant had erected a port-a-pot until he received a complaint. He immediately told the tenant to remove the port-a-pot. It is not his intention to bring property values down. The long term and best use of the subject property is as a residential use. All of the properties in the neighborhood would be much more valuable once sewer service is installed. However, the Harford County Health Department will not allow him to use his property for residential purposes at the present time.

Mr. Rye agreed to plant additional landscaping if that would be helpful. He would also put up a fence if helpful. He would agree to a condition that the use would terminate as soon as public sewer comes into the area. He is only seeking a temporary use until sewer arrives. He would agree to a prohibition against signage; and he would agree to a limitation on employees.

The property had bad percolation when he purchased it. Originally the Harford County Health Department would not even allow him to install a holding tank.

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APPLICABLE LAW:

Section 267-11 of the Harford County Code allows the granting of a variance to the requirements of the Code:

“Variances.

- A. Except as provided in Section 267-41.1.H., variances from the provisions or requirements of this Part 1 may be granted if the Board finds that:*
 - (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Part 1 would result in practical difficulty or unreasonable hardship.*
 - (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.*
- B. In authorizing a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.*
- C. If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval.”*

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The pertinent facts of this case are not in dispute. In 1976 the Applicants purchased the subject property. Prior to that it had been owned and operated by AT&T. The building is a fairly non-descript brick structure, of approximately 1,300 square feet with a slate roof. Water has never been connected to the property; public sewer has never been connected to the property. For all the years during which the Applicants have utilized the property, the employees who worked within the building used an adjacent outhouse as did, apparently, the AT&T employees before them.

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It is undisputed that for most if not all of the years the Applicants owned and operated their business from the property, there was no impact on the neighborhood. Indeed, neighbors testified they did not realize the property was being used for something other than as a telephone company building. Apparently signs were never posted on the property and few if any vehicles were noticed going to or from the property. In appearance, and in use, the building was totally non-threatening to the neighborhood and was, indeed, almost unnoticed.

It is also undisputed that the Applicants received a use variance for their use of the building shortly after its purchase, and used the building in compliance of the terms of that variance for many years thereafter. Again, there was no objection from the neighbors to this use, or even any notice made of it.

It was only when the Applicants elected to cease their business and rent the building to a carpenter/contractor for the storage of his materials that the use of the building came to the attention of the neighbors. The tenant apparently erected a port-a-pot, and also placed a sign on the property which immediately directed the neighbors' attention to the building, and alerted them to the fact that its use had changed. The neighbors' complaint is that a commercial use is not something which they feel belongs in what they characterize as a residential neighborhood. No other objection was articulated. No specific feature of the proposed use was identified as being otherwise objectionable.

Furthermore, the Harford County Department of Health will not allow the subject property to be converted to a residential use despite its having the appropriate residential zoning, and despite the fact that other properties in the neighborhood are residentially zoned and used. Percolation problems and the lack of a public sewer prohibit the installation of a residentially sized septic system. The Health Department will, however, while prohibiting a system for a residence to be installed, allow the property to be used for the limited commercial purpose for which the use variance is requested, and then only with a holding tank. There is, again, no dispute as to these facts. Indeed, there was much testimony that the percolation in the area is not good, and that there are at least a few other holding tanks in the area.¹ It is accordingly found that the installation of a holding tank on the subject property would not be out of keeping with the neighborhood, nor by itself have any adverse impact on the neighborhood.²

Furthermore, aside from the generalized objections of the neighbors, no evidence of any nature was presented, or can be inferred, that a warehouse/storage facility as proposed by the Applicant, if properly conditioned, would have any adverse impact on the neighborhood. In support of this finding is the testimony of the Harford County Department of Planning and Zoning representative who specifically found there to be no adverse impact if the variance were granted.

¹ A study cited by one of the opponents indicated that out of a total of 480 sites studied approximately 8 had holding tanks.

² Indeed, it would seem that, to an admittedly non-expert observer, the installation of a sewage holding tank to Health Department Regulations would be more beneficial to the neighborhood than the continuous use of an outhouse.

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It is further found as a fact that, without a variance, the subject property would have no utility to the Applicants, who would be able to secure no return whatsoever from it. The property is now zoned residential, and it is undisputed that a residential use cannot be made of the property until public sewer is brought to the area. It is only by virtue of the variance granted in 1976 that the Applicants are able to make any use of the property at all. That use, a small family owned and managed manufacturing business, no longer takes place on the property and, in fact, had long been operated on a fairly sporadic basis. Any non-conforming use which would have been established by AT&T's use of the property has long since terminated.

Accordingly, the Applicants are faced with a situation where they must either seek and receive a variance, continue to use the building for a family business which they no longer desire to engage in, or allow the building to sit unoccupied, without activity, until public sewer is brought to the property.

It is accordingly found that by virtue of these factors, the property is, in fact, unique. The property is virtually unusable due to the circumstances beyond the control of the Applicants. Certainly, these facts operate so as to preclude the Applicants from any reasonable significant use of the property. The property, obviously, cannot be used again for its original purpose, i.e., an AT&T facility. Its zoning is residential which generally prohibits its use for commercial purposes. It cannot be used for residential uses due to percolation problems and the lack of public sewer in the area. The only use for which can be made of the property is that for which a variance was granted in 1976, a use which is no longer viable for the Applicants. No other property in the area has been identified as having such an unusual set of circumstances. Accordingly, for reasons not of the Applicants' making, the property is found to be unique. See Cromwell v. Ward, 102 Md. App. 691 (1995).

Having found that the property is unique, it must then be determined if, as a result, the Applicant would suffer a practical difficulty or unreasonable hardship by virtue of the literal enforcement of the Harford County Development Regulations. Put another way, provided that Harford County Department Regulations would prevent all residential use of the property, which is found to be a fact, would the Applicant suffer practical difficulty and/or unreasonable hardship? The answer must be, of course, that a practical difficulty and unreasonable hardship would indeed result if the variance were not granted. No use could be made of the property without the variance, through no fault of the Applicant.

As set forth above, the property was originally used for commercial purposes when the Applicant purchased the property. With the approval of a use variance approximately twenty-five years ago, the Applicant then began to use the property for an alternate use, apparently without objection. Because of percolation problems which the Health Department has determined to be sufficient so as to prohibit the use of the property for residential purposes, the Applicant is now faced with a virtual inability to use the property for any permitted purpose. These are facts which fully support a finding of a practical difficulty and reasonable hardship.

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CONCLUSION:

Accordingly, for reasons stated above, the requested variance is hereby approved subject to the following conditions:

1. That the Applicants obtain all necessary permits and inspections for the use of the building.
2. The approval shall be limited to the proposed use of the property for a warehousing/storage facility.
3. There shall be no outside storage of materials.
4. A holding tank be installed according to Health Department Regulations.
5. That no signs advertising the business be erected on the subject property.
6. That no dumpsters or outside storage facility shall be located on the subject property.
7. That no activities other than warehousing/storage shall be conducted from the subject property.
8. That a landscape and screening plan be submitted for review and approval by the Harford County Department of Planning and Zoning.
9. That the use variance granted herein shall terminate upon such time as public sewer service becomes available to the subject property.

Date: September 14, 2004

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner